

1 Mara W. Murphy (State Bar No. 185902)
2 David A. Forkner (*pro hac vice*)
3 Eli S. Schlam (*pro hac vice*)
4 WILLIAMS & CONNOLLY LLP
5 725 Twelfth Street, N.W.
6 Washington, DC 20005
7 Telephone: (202) 434-5000
8 Fax: (202) 434-5029
9 E-mail: mmurphy@wc.com
10 E-mail: dforkner@wc.com
11 E-mail: eschlam@wc.com

12 Jeffrey E. Faucette (State Bar No. 193066)
13 SKAGGS FAUCETTE LLP
14 One Embarcadero Center, Suite 500
15 San Francisco, CA 94111
16 Telephone: (415) 315-1669
17 Facsimile: (415) 433-5994
18 E-mail: jeff@skaggsfaucette.com

19 *Attorneys for Defendant Mars, Incorporated*

20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
559
560
561
562
563
564
565
566
567
568
569
569
570
571
572
573
574
575
576
577
578
579
579
580
581
582
583
584
585
586
587
588
589
589
590
591
592
593
594
595
596
597
598
599
599
600
601
602
603
604
605
606
607
608
609
609
610
611
612
613
614
615
616
617
618
619
619
620
621
622
623
624
625
626
627
628
629
629
630
631
632
633
634
635
636
637
638
639
639
640
641
642
643
644
645
646
647
648
649
649
650
651
652
653
654
655
656
657
658
659
659
660
661
662
663
664
665
666
667
668
669
669
670
671
672
673
674
675
676
677
678
679
679
680
681
682
683
684
685
686
687
688
689
689
690
691
692
693
694
695
696
697
698
699
699
700
701
702
703
704
705
706
707
708
709
709
710
711
712
713
714
715
716
717
718
719
719
720
721
722
723
724
725
726
727
728
729
729
730
731
732
733
734
735
736
737
738
739
739
740
741
742
743
744
745
746
747
748
749
749
750
751
752
753
754
755
756
757
758
759
759
760
761
762
763
764
765
766
767
768
769
769
770
771
772
773
774
775
776
777
778
779
779
780
781
782
783
784
785
786
787
788
789
789
790
791
792
793
794
795
796
797
798
799
799
800
801
802
803
804
805
806
807
808
809
809
810
811
812
813
814
815
816
817
818
819
819
820
821
822
823
824
825
826
827
828
829
829
830
831
832
833
834
835
836
837
838
839
839
840
841
842
843
844
845
846
847
848
849
849
850
851
852
853
854
855
856
857
858
859
859
860
861
862
863
864
865
866
867
868
869
869
870
871
872
873
874
875
876
877
878
879
879
880
881
882
883
884
885
886
887
888
889
889
890
891
892
893
894
895
896
897
898
899
899
900
901
902
903
904
905
906
907
908
909
909
910
911
912
913
914
915
916
917
918
919
919
920
921
922
923
924
925
926
927
928
929
929
930
931
932
933
934
935
936
937
938
939
939
940
941
942
943
944
945
946
947
948
949
949
950
951
952
953
954
955
956
957
958
959
959
960
961
962
963
964
965
966
967
968
969
969
970
971
972
973
974
975
976
977
978
979
979
980
981
982
983
984
985
986
987
988
989
989
990
991
992
993
994
995
996
997
998
999
1000
1001
1002
1003
1004
1005
1006
1007
1008
1009
1009
1010
1011
1012
1013
1014
1015
1016
1017
1018
1019
1019
1020
1021
1022
1023
1024
1025
1026
1027
1028
1029
1029
1030
1031
1032
1033
1034
1035
1036
1037
1038
1039
1039
1040
1041
1042
1043
1044
1045
1046
1047
1048
1049
1049
1050
1051
1052
1053
1054
1055
1056
1057
1058
1059
1059
1060
1061
1062
1063
1064
1065
1066
1067
1068
1069
1069
1070
1071
1072
1073
1074
1075
1076
1077
1078
1079
1079
1080
1081
1082
1083
1084
1085
1086
1087
1088
1089
1089
1090
1091
1092
1093
1094
1095
1096
1097
1098
1099
1099
1100
1101
1102
1103
1104
1105
1106
1107
1108
1109
1109
1110
1111
1112
1113
1114
1115
1116
1117
1118
1119
1119
1120
1121
1122
1123
1124
1125
1126
1127
1128
1129
1129
1130
1131
1132
1133
1134
1135
1136
1137
1138
1139
1139
1140
1141
1142
1143
1144
1145
1146
1147
1148
1149
1149
1150
1151
1152
1153
1154
1155
1156
1157
1158
1159
1159
1160
1161
1162
1163
1164
1165
1166
1167
1168
1169
1169
1170
1171
1172
1173
1174
1175
1176
1177
1178
1179
1179
1180
1181
1182
1183
1184
1185
1186
1187
1188
1189
1189
1190
1191
1192
1193
1194
1195
1196
1197
1198
1199
1199
1200
1201
1202
1203
1204
1205
1206
1207
1208
1209
1209
1210
1211
1212
1213
1214
1215
1216
1217
1218
1219
1219
1220
1221
1222
1223
1224
1225
1226
1227
1228
1229
1229
1230
1231
1232
1233
1234
1235
1236
1237
1238
1239
1239
1240
1241
1242
1243
1244
1245
1246
1247
1248
1249
1249
1250
1251
1252
1253
1254
1255
1256
1257
1258
1259
1259
1260
1261
1262
1263
1264
1265
1266
1267
1268
1269
1269
1270
1271
1272
1273
1274
1275
1276
1277
1278
1279
1279
1280
1281
1282
1283
1284
1285
1286
1287
1288
1289
1289
1290
1291
1292
1293
1294
1295
1296
1297
1298
1299
1299
1300
1301
1302
1303
1304
1305
1306
1307
1308
1309
1309
1310
1311
1312
1313
1314
1315
1316
1317
1318
1319
1319
1320
1321
1322
1323
1324
1325
1326
1327
1328
1329
1329
1330
1331
1332
1333
1334
1335
1336
1337
1338
1339
1339
1340
1341
1342
1343
1344
1345
1346
1347
1348
1349
1349
1350
1351
1352
1353
1354
1355
1356
1357
1358
1359
1359
1360
1361
1362
1363
1364
1365
1366
1367
1368
1369
1369
1370
1371
1372
1373
1374
1375
1376
1377
1378
1379
1379
1380
1381
1382
1383
1384
1385
1386
1387
1388
1389
1389
1390
1391
1392
1393
1394
1395
1396
1397
1398
1399
1399
1400
1401
1402
1403
1404
1405
1406
1407
1408
1409
1409
1410
1411
1412
1413
1414
1415
1416
1417
1418
1419
1419
1420
1421
1422
1423
1424
1425
1426
1427
1428
1429
1429
1430
1431
1432
1433
1434
1435
1436
1437
1438
1439
1439
1440
1441
1442
1443
1444
1445
1446
1447
1448
1449
1449
1450
1451
1452
1453
1454
1455
1456
1457
1458
1459
1459
1460
1461
1462
1463
1464
1465
1466
1467
1468
1469
1469
1470
1471
1472
1473
1474
1475
1476
1477
1478
1479
1479
1480
1481
1482
1483
1484
1485
1486
1487
1488
1489
1489
1490
1491
1492
1493
1494
1495
1496
1497
1498
1499
1499
1500
1501
1502
1503
1504
1505
1506
1507
1508
1509
1509
1510
1511
1512
1513
1514
1515
1516
1517
1518
1519
1519
1520
1521
1522
1523
1524
1525
1526
1527
1528
1529
1529
1530
1531
1532
1533
1534
1535
1536
1537
1538
1539
1539
1540
1541
1542
1543
1544
1545
1546
1547
1548
1549
1549
1550
1551
1552
1553
1554
1555
1556
1557
1558
1559
1559
1560
1561
1562
1563
1564
1565
1566
1567
1568
1569
1569
1570
1571
1572
1573
1574
1575
1576
1577
1578
1579
1579
1580
1581
1582
1583
1584
1585
1586
1587
1588
1589
1589
1590
1591
1592
1593
1594
1595
1596
1597
1598
1599
1599
1600
1601
1602
1603
1604
1605
1606
1607
1608
1609
1609
1610
1611
1612
1613
1614
1615
1616
1617
1618
1619
1619
1620
1621
1622
1623
1624
1625
1626
1627
1628
1629
1629
1630
1631
1632
1633
1634
1635
1636
1637
1638
1639
1639
1640
1641
1642
1643
1644
1645
1646
1647
1648
1649
1649
1650
1651
1652
1653
1654
1655
1656
1657
1658
1659
1659
1660
1661
1662
1663
1664
1665
1666
1667
1668
1669
1669
1670
1671
1672
1673
1674
1675
1676
1677
1678
1679
1679
1680
1681
1682
1683
1684
1685
1686
1687
1688
1689
1689
1690
1691
1692
1693
1694
1695
1696
1697
1698
1699
1699
1700
1701
1702
1703
1704
1705
1706
1707
1708
1709
1709
1710
1711
1712
1713
1714
1715
1716
1717
1718
1719
1719
1720
1721
1722
1723
1724
1725
1726
1727
1728
1729
1729
1730
1731
1732
1733
1734
1735
1736
1737
1738
1739
1739
1740
1741
1742
1743
1744
1745
1746
1747
1748
1749
1749
1750
1751
1752
1753
1754
1755
1756
1757
1758
1759
1759
1760
1761
1762
1763
1764
1765
1766
1767
1768
1769
1769
1770
1771
1772
1773
1774
1775
1776
1777
1778
1779
1779
1780
1781
1782
1783
1784
1785
1786
1787
1788
1789
1789
1790
1791
1792
1793
1794
1795
1796
1797
1798
1799
1799
1800
1801
1802
1803
1804
1805
1806
1807
1808
1809
1809
1810
1811
1812
1813
1814
1815
1816
1817
1818
1819
1819
1820
1821
1822
1823
1824
1825
1826
1827
1828
1829
1829
1830
1831
1832
1833
1834
1835
1836
1837
1838
1839
1839
1840
1841
1842
1843
1844
1845
1846
1847
1848
1849
1849
1850
1851
1852
1853
1854
1855
1856
1857
1858
1859
1859
1860
1861
1862
1863
1864
1865
1866
1867
1868
1869
1869
1870
1871
1872
1873
1874
1875
1876
18

TABLE OF CONTENTS

	Page
3 TABLE OF AUTHORITIES	iii
4 NOTICE OF MOTION AND MOTION TO DISMISS	vii
5 STATEMENT OF ISSUES TO BE DECIDED	viii
6 MEMORANDUM OF POINTS AND AUTHORITIES	1
7 INTRODUCTION	1
8 BACKGROUND	1
9 A. The 43 Different Varieties of Uncle Ben's® Rice.....	2
10 B. The Diverse Packaging of the 43 Varieties of Uncle Ben's® Rice.....	4
11 C. Plaintiffs' Far-Ranging and Wholly-Conclusory Challenge to the Diverse 12 Packaging of the 43 Varieties of Uncle Ben's® Rice.....	5
13 STANDARD OF REVIEW	7
14 ARGUMENT	7
15 I. Plaintiffs Fail To State a Claim (Counts I–V)	7
16 A. Functional vs. Non-Functional Slack-Fill.....	8
17 B. Plaintiffs Do Not Adequately Plead Violations of Slack-Fill Regulations.....	10
18 1. Plaintiffs' Allegations Are Impermissibly Conclusory.....	10
19 2. Plaintiffs' Conclusory Allegations Are Facialily Implausible.....	11
20 II. Plaintiffs Lack Standing To Sue for 40 Varieties of Uncle Ben's® Rice 21 They Did Not Purchase (Counts I–V).....	13
22 III. Plaintiffs Lack Standing To Request Injunctive Relief (Counts I–V)	15
23 IV. Plaintiffs Cannot Maintain a Claim for Negligent Misrepresentation (Count V).....	17
24 A. Plaintiffs Fail To State a Negligent Misrepresentation Claim under 25 California Law.....	17
26 B. Plaintiffs Fail To State a Negligent Misrepresentation Claim under 27 New York Law.....	18
28 V. Plaintiffs Cannot Apply Consumer Protection Laws Extraterritorially (Counts I–IV).	19

1	A. Plaintiffs Cannot Enforce California Laws Outside of California (Counts I, II, & III)	19
2	B. Plaintiffs Cannot Enforce New York Law Outside New York (Count IV)	20
3	CONCLUSION.....	21
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

FEDERAL CASES

3	Aetna Cas. & Sur. Co. v. Aniero Concrete Co., 404 F.3d 566 (2d Cir. 2005) (per curiam).....	18
4	Am. Protein Corp. v. AB Volvo, 844 F.2d 56 (2d Cir. 1988).....	18, 19
5	Anderson v. Jamba Juice Co., 888 F. Supp. 2d 1000 (N.D. Cal. 2012)	13
6	Ashcroft v. Iqbal, 556 U.S. 662 (2009).....	7, 10, 11, 12
7	Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005)	8
8	Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).....	7
9	Bird v. First Alert, Inc., No. C 14-3585 PJH, 2014 WL 7248734 (N.D. Cal. Dec. 19, 2014).....	16
10	Brown v. Hain Celestial Grp., Inc., 913 F. Supp. 2d 881 (N.D. Cal. 2012).....	13
11	Carrea v. Dreyer's Grand Ice Cream, Inc., No. C 10-01044JSW, 2011 WL 159380 (N.D. Cal. Jan. 10, 2011), aff'd, 475 F. App'x 113 (9th Cir. 2012)	13
12	Cipollone v. Liggett Grp., Inc., 505 U.S. 504 (1992)	8
13	City of Los Angeles v. Lyons, 461 U.S. 95 (1983)	15
14	Corcoran v. CVS Health Corp., No. 15-cv-3504YGR, --- F. Supp. 3d ---, 2016 WL 948880 (N.D. Cal. Mar. 14, 2016).....	10
15	DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006).....	13
16	Dall. Aerospace, Inc. v. CIS Air Corp., 352 F.3d 775 (2d Cir. 2003)	19
17	Das v. WMC Mortg. Corp., 831 F. Supp. 2d 1147 (N.D. Cal. 2011)	7
18	Delarosa v. Boiron, Inc., No. SACV 10-1569-JST, 2012 WL 8716658 (C.D. Cal. Dec. 28, 2012).....	15
19	Figy v. Frito-Lay N. Am., Inc., 67 F. Supp. 3d 1075 (N.D. Cal. 2014)	19
20	Frenzel v. AliphCom, 76 F. Supp. 3d 999 (N.D. Cal. 2014).....	16, 17
21	Gentges v. Trend Micro Inc., No. C11-5574SBA, 2012 WL 2792442 (N.D. Cal. July 9, 2012).....	20

1	<i>Gitson v. Trader Joe's Co.</i> , No. 13-cv-01333-WHO, 2013 WL 5513711 (N.D. Cal. Oct. 4, 2013)	12
2	<i>Hartman v. Gilead Scis., Inc.</i> , 536 F.3d 1049 (9th Cir. 2008).....	10
3	<i>Henderson v. Gruma Corp.</i> , No. CV 10-04173AHM, 2011 WL 1362188 (C.D. Cal. Apr. 11, 2011).....	15
4	<i>Hendricks v. StarKist Co.</i> , 30 F. Supp. 3d 917 (N.D. Cal. 2014)	13
5	<i>Hodgers-Durgin v. De La Vina</i> , 199 F.3d 1037 (9th Cir. 1999) (en banc).....	17
6	<i>Ivie v. Kraft Foods Glob., Inc.</i> , 961 F. Supp. 2d 1033 (N.D. Cal. 2013).....	14
7	<i>Jurgensen v. Felix Storch, Inc.</i> , No. 12 Civ. 1201(KBF), 2012 WL 2354247 (S.D.N.Y. June 14, 2012).....	19
8	<i>Kearns v. Ford Motor Co.</i> , 567 F.3d 1120 (9th Cir. 2009)	7, 10
9	<i>Landesbank Baden-Wurttemberg v. Goldman, Sachs & Co.</i> , 478 F. App'x 679 (2d Cir. 2012).....	19
10	<i>Leonhart v. Nature's Path Foods, Inc.</i> , No. 13-cv-00492BLF, 2014 WL 6657809 (N.D. Cal. Nov. 21, 2014).....	14, 17
11	<i>Lewis v. Casey</i> , 518 U.S. 343 (1996).....	17
12	<i>Lilly v. Jamba Juice Co.</i> , No. 13-cv-02887-JST, 2015 WL 1248027 (N.D. Cal. March 18, 2015).....	15
13	<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992).....	13
14	<i>Luman v. Theismann</i> , No. 14-15385, 2016 WL 1393432 (9th Cir. Apr. 8, 2016).....	15, 16
15	<i>McGlinchy v. Shell Chem. Co.</i> , 845 F.2d 802 (9th Cir. 1988).....	10
16	<i>McKinnis v. Kellogg USA</i> , No. CV07-2611ABC, 2007 WL 4766060 (C.D. Cal. Sept. 19, 2007)	6, 12
17	<i>Miller v. Ghirardelli Chocolate Co.</i> , 912 F. Supp. 2d 861 (N.D. Cal. 2012).....	13
18	<i>Mills v. Giant of Md., LLC</i> , 441 F. Supp. 2d 104 (D.D.C. 2006), <i>aff'd on other grounds</i> , 508 F.3d 11 (D.C. Cir. 2007).....	8
19	<i>Mitsui O.S.K. Lines, Ltd. v. SeaMaster Logistics, Inc.</i> , 913 F. Supp. 2d 780 (N.D. Cal. 2012), <i>aff'd in part, rev'd in part</i> , 618 F. App'x 304 (9th Cir. 2015).....	17
20	<i>Mosely v. Vitalize Labs, LLC</i> , Nos. 13 CV 2470 (RJD)(RLM), 14 CV 4474 (RJD)(RLM), 2015 WL 5022635 (E.D.N.Y. Aug. 24, 2015).....	20
21	<i>Perez v. Nidek Co., Ltd.</i> , 711 F.3d 1109 (9th Cir. 2013)	16

1	<i>Rahman v. Mott's LLP</i> , No. CV-3482 SI, 2014 WL 325241 (N.D. Cal. Jan. 29, 2014)	16
2	<i>Raines v. Byrd</i> , 521 U.S. 811 (1997)	15
3	<i>Riegel v. Medtronic, Inc.</i> , 552 U.S. 312 (2008)	8
4	<i>Surzyn v. Diamond Foods, Inc.</i> , No. C14-0136SBA, 2014 WL 2212216 (N.D. Cal. May 28, 2014)	11
5	<i>Swartz v. KPMG LLP</i> , 476 F.3d 756 (9th Cir. 2007) (per curiam)	7
6	<i>Szymczak v. Nissan N. Am., Inc.</i> , No. 10CV7493 (VB), 2011 WL 7095432 (S.D.N.Y. Dec. 16, 2011)	20
7	<i>Thomas v. Costco Wholesale Corp.</i> , No. 5:12-CV-02908EJD, 2013 WL 1435292 (N.D. Cal. Apr. 9, 2013)	11
8	<i>Viggiano v. Hansen Nat. Corp.</i> , 944 F. Supp. 2d 877 (C.D. Cal. 2013)	12
9	<i>Williamson v. McAfee, Inc.</i> , No. 5:14-CV-00158-EJD, 2014 WL 4220824 (N.D. Cal. Aug. 22, 2014)	20
10	<i>Wilson v. Frito-Lay N. Am., Inc.</i> , 961 F. Supp. 2d 1134 (N.D. Cal. 2013)	13, 14

STATE CASES

11	<i>Credit All. Corp. v. Arthur Andersen & Co.</i> , 483 N.E.2d 110 (N.Y. 1985)	18
12	<i>Goshen v. Mut. Life Ins. Co. of N.Y.</i> , 774 N.E.2d 1190 (N.Y. 2002)	20
13	<i>High Tides, LLC v. DeMichele</i> , 931 N.Y.S.2d 377 (2d Dep't 2011)	18
14	<i>J.A.O. Acquisition Corp. v. Stavitsky</i> , 863 N.E.2d 585 (N.Y. 2007)	18
15	<i>Kimmell v. Schaefer</i> , 675 N.E.2d 450 (N.Y. 1996)	18
16	<i>Mandarin Trading Ltd. v. Wildenstein</i> , 944 N.E.2d 1104 (N.Y. 2011)	18
17	<i>Norwest Mort., Inc. v. Sup. Ct.</i> , 85 Cal. Rptr. 2d 18 (Ct. App. 1999)	19, 20
18	<i>Ossining Union Free Sch. Dist. v. Anderson LaRocca Anderson</i> , 39 N.E.2d 91 (N.Y. 1989)	18
19	<i>Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood</i> , 605 N.E.2d 318 (N.Y. 1992)	18
20	<i>Wilson v. Century 21 Great W. Realty</i> , 18 Cal. Rptr. 2d 779 (Ct. App. 1993)	17

OTHER AUTHORITIES

2	21 C.F.R. § 100.100	9, 11, 14, 15
3	21 C.F.R. § 101.9(b)(8).....	6, 12
4	21 U.S.C. §§ 343.....	6, 8, 12
5	21 U.S.C. § 343-1(a)(3)	8
6	60A N.Y. Jur. <i>Fraud and Deceit</i> § 143 (West 2016).....	19
7	Cal. Civ. Code § 1750–1784.....	1
8	Cal. Bus. & Prof. Code § 17200–17209	1
9	Cal. Bus. & Prof. Code § 17500–17509	1
10	Food, Drug, and Cosmetics Act, 21 U.S.C. §§ 301 <i>et seq.</i>	8
11	Fed. R. Civ. P. 9(b)	vii, 7, 10, 11, 18
12	Fed. R. Civ. P. 12(b)(1).....	vii
13	Fed. R. Civ. P. 12(b)(6).....	vii, 7
14	<i>Misleading Containers; Nonfunctional Slack-Fill</i> , 58 Fed. Reg. 2957 (Jan. 6, 1993).....	8, 9, 12
15	<i>Misleading Containers; Nonfunctional Slack-Fill</i> , 58 Fed. Reg. 64,123 (Dec. 6, 1993)	9, 15
16	N.Y. Gen. Bus. Law § 349.....	1, 19, 20
17	U.S. Const., Art. III.....	15, 16, 17

NOTICE OF MOTION AND MOTION TO DISMISS

2 PLEASE TAKE NOTICE THAT on October 18, 2016, at 2:00 p.m., or as soon thereafter
3 as the matter may be heard, in the United States District Court for the Northern District of
4 California, Oakland Division, in Courtroom 1, Fourth Floor, 1301 Clay Street, Oakland,
5 California, before the Hon. Yvonne Gonzalez Rogers, Defendant Mars, Incorporated (“Mars”)
6 will move to dismiss this action with prejudice pursuant to Federal Rules of Civil Procedure 9(b),
7 12(b)(1), and 12(b)(6).

8 Mars's Motion rests on the following grounds, which are set forth in detail in the attached
9 Memorandum of Points and Authorities:

10 1. The Complaint fails to state a claim because (a) the Food and Drug Administration
11 has issued regulations governing slack-fill—which preempt state law claims—that
12 provide that slack-fill is only misleading if it is nonfunctional and (b) the
13 Complaint does not sufficiently allege that the slack-fill in Uncle Ben’s® rice
14 products is nonfunctional;

15 2. Plaintiffs lack standing to bring claims based on products they did not purchase;

16 3. Plaintiffs lack standing to seek injunctive relief;

17 4. Plaintiffs fail to state a claim for negligent misrepresentation under California or
18 New York law; and

19 5. Plaintiffs’ claims seeking to apply California and New York statutes
20 extraterritorially must be dismissed.

21 The Motion is based on this Notice, the supporting Memorandum of Points and
22 Authorities, the accompanying Request for Judicial Notice and exhibit thereto, the Declaration of
23 Eli S. Schlam in Support of Mars's Request for Judicial Notice, Plaintiffs' Complaint, any reply
24 brief filed hereafter, the oral argument of the parties, and the complete files and records for this
25 action.

STATEMENT OF ISSUES TO BE DECIDED

1. Do Plaintiffs state a claim against 43 different varieties of Uncle Ben's® rice by making naked, conclusory, and implausible assertions that all containers of Uncle Ben's® rice products contain empty space that serve no functional purpose?
2. Under Article III of the United States Constitution, do Plaintiffs have standing to bring claims with respect to 40 different varieties of Uncle Ben's® rice products they never purchased?
3. Do Plaintiffs, who have alleged that they will never again purchase Uncle Ben's® rice, have standing to seek prospective injunctive relief?
4. Have Plaintiffs stated a claim for negligent misrepresentation under California and New York law where there is no affirmative misrepresentation and no special or privity-like relationship?
5. Can Plaintiffs sue an out-of-state company under California's and New York's consumer protection statutes on behalf of out-of-state members of a nationwide putative class who made out-of-state purchases of Uncle Ben's® rice products?

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

3 This suit boils down to Plaintiffs' claim that each and every container of 43 different
4 varieties of Uncle Ben's® rice sold throughout the United States is misbranded, because when
5 they purchased Uncle Ben's® rice, they did not "receive a full container of product." Complaint
6 ("Compl.") ¶ 5. The Complaint summarily alleges that Mars, Incorporated ("Mars") intentionally
7 incorporated empty space or "slack-fill" into every container of Uncle Ben's® rice products sold
8 throughout the United States "to mislead . . . consumers[.]" *Id.* ¶ 22. With that factually-
9 unsupported assertion, Plaintiffs hope to represent a putative class consisting of "[a]ll persons in
10 the United States who made retail purchases" of every variety of Uncle Ben's® rice over the past
11 four years. *Id.* ¶ 40.¹

12 But Plaintiffs' Complaint is replete with conclusory and implausible allegations that are
13 insufficient to state a claim or to burden Mars with expense of defending against a multi-claim
14 nationwide putative class action. It fails to address in any meaningful way the regulations that
15 expressly permit slack-fill and with which Mars fully complies. It improperly attempts to leverage
16 Plaintiffs' purchase of a handful of Uncle Ben's® rice products to challenge 43 different varieties
17 of Uncle Ben's® rice. It seeks injunctive relief despite admitting that Plaintiffs will never purchase
18 another Uncle Ben's® rice product. And it tries to improve their chances of maintaining a putative
19 class action by invoking inapplicable common law remedies and wrongly applying the consumer
20 protection laws of California and New York to out-of-state purchases of Uncle Ben's® rice. Such
21 an improper and incomplete pleading should be dismissed with prejudice.

BACKGROUND

23 Mars is a leading food, beverage, and confectionary company. Among its many iconic
24 brands are M&M'S®, SNICKERS®, 3 MUSKETEERS®, MILKY WAY®, and Uncle Ben's® rice.
25 This case involves Uncle Ben's® rice. Uncle Ben's® rice has been marketed and sold since 1946

²⁶ ¹ Plaintiffs purport to assert claims under California’s Consumer Legal Remedies Act, Cal. Civ. Code § 1750–1784 (“CLRA”) (Count I); all three prongs of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200–17209 (“UCL”) (Count II); the False Advertising Law, Cal. Bus. & Prof. Code § 17500–17509 (“FAL”) (Count III); New York’s Deceptive Trade Practices Act, N.Y. Gen. Bus. Law § 349 (Count IV); and common law negligent misrepresentation (Count V).

1 and can now be found in homes, restaurants, and commercial kitchens in more than 100 countries
 2 worldwide. *See* Compl. ¶ 4 (“Defendant’s Rice Products are made from ‘a tradition of quality and
 3 variety since 1946.’”); *see id.* ¶ 3 (“Defendant’s Rice Products are sold throughout the world,
 4 including the U.S., online and at various stores, including most grocery stores.”). Uncle Ben’s®
 5 rice “[p]roducts are among the top selling rice products in the world.” *Id.* ¶ 14. This is due in part
 6 to Uncle Ben’s® large number of “varying types and flavors of rice.” *Id.* ¶ 19.

7 **A. The 43 Different Varieties of Uncle Ben’s® Rice.**

8 There are 43 different varieties of Uncle Ben’s® rice. *See* Mars’s Request for Judicial
 9 Notice (“RJN”) Ex. A. These varieties can be loosely grouped into six broad categories, which
 10 “include: (1) White Rice, (2) [Whole Grain] Brown Rice, (3) Flavored Grains (i.e., flavored rice),
 11 (4) Country Inn® Rice, (5) Ready Rice®, [a]nd (6) Dry Specialty Rice.” *Id.* ¶ 19. Each category
 12 includes numerous rice products as follows:

CATEGORY	UNCLE BEN’S® RICE PRODUCTS
White Rice	UNCLE BEN’S® Boil-in-Bag Rice UNCLE BEN’S® Instant Rice UNCLE BEN’S® ORIGINAL CONVERTED® Brand Rice
Whole Grain Brown Rice	UNCLE BEN’S® Instant Brown Rice UNCLE BEN’S® Whole Grain Brown Rice UNCLE BEN’S® Boil-in-Bag Whole Grain Brown
Flavored Grains	UNCLE BEN’S® 5 Grain Medley, Quinoa Pilaf UNCLE BEN’S® Brown Rice Medley, Roasted Garlic & Herb UNCLE BEN’S® Brown Rice & Quinoa, Roasted Red Pepper UNCLE BEN’S® Long Grain & Wild Rice Fast Cook Recipe UNCLE BEN’S® Long Grain & Wild Rice, Original Recipe UNCLE BEN’S® Basmati Medley, Savory Herb
Country Inn® Rice	UNCLE BEN’S® COUNTRY INN® Chicken & Broccoli Rice UNCLE BEN’S® COUNTRY INN® Broccoli Rice Au Gratin UNCLE BEN’S® COUNTRY INN® Chicken & Vegetable Rice UNCLE BEN’S® COUNTRY INN® Chicken & Wild Rice UNCLE BEN’S® COUNTRY INN® Chicken Flavored Rice UNCLE BEN’S® COUNTRY INN® Rice Pilaf
Ready Rice®	UNCLE BEN’S® READY RICE® Basmati UNCLE BEN’S® READY RICE® Beef Flavor UNCLE BEN’S® READY RICE® Pinto Beans & Rice UNCLE BEN’S® READY RICE® Brown, Red & Black Rice UNCLE BEN’S® READY RICE® Brown Basmati UNCLE BEN’S® READY RICE® Butter & Garlic Flavored UNCLE BEN’S® READY RICE® Chicken Flavored Whole Grain Brown

CATEGORY	UNCLE BEN'S® RICE PRODUCTS
Ready Rice®, cont'd.	UNCLE BEN'S® READY RICE® Creamy Four Cheese Flavored UNCLE BEN'S® READY RICE® Garden Vegetable UNCLE BEN'S® READY RICE® Jasmine UNCLE BEN'S® READY RICE® Long Grain & Wild UNCLE BEN'S® READY RICE® Original Long Grain UNCLE BEN'S® READY RICE® Red Beans and Rice UNCLE BEN'S® READY RICE® Rice Pilaf UNCLE BEN'S® READY RICE® Roasted Chicken Flavored UNCLE BEN'S® READY RICE® Spanish Style UNCLE BEN'S® READY RICE® Teriyaki Style UNCLE BEN'S® READY RICE® Whole Grain Brown UNCLE BEN'S® WHOLE GRAIN MEDLEY™ Brown & Wild Rice UNCLE BEN'S® READY WHOLE GRAIN MEDLEY™ Chicken Medley UNCLE BEN'S® WHOLE GRAIN MEDLEY™ Santa Fe UNCLE BEN'S® WHOLE GRAIN MEDLEY™ Brown Rice and Quinoa UNCLE BEN'S® WHOLE GRAIN MEDLEY™ Vegetable Harvest
Dry Specialty Rice	UNCLE BEN'S® Basmati Rice UNCLE BEN'S® Jasmine Rice

See RJD Ex. A.

These 43 varieties of Uncle Ben's® rice vary substantially. Uncle Ben's® rice variously contain parboiled rice, dry rice, and both water and parboiled rice. *See RJD Ex. A* at 5, 43, 87. The type of rice meaningfully varies, including Brown Long Grain Rice, White Long Grain Rice, Basmati Rice (white and brown), Red Rice, Jasmine Rice, and Wild Rice. *See RJD Ex. A*. Uncle Ben's® rice varieties are sold in different forms, including: (1) in their classic form, such as Uncle Ben's® Ready Rice® Brown Basmati, *see id.* at 49; (2) in flavorful medleys, such as Uncle Ben's® 5 Grain Medley, Quinoa Pilaf, which combines brown rice, whole grain red rice, couscous, and two varieties of quinoa, *see id.* at 15; (3) seasoned with sauces and vegetables, such as Uncle Ben's® Country Inn® Broccoli Rice Au Gratin, *see id.* at 30; and (4) seasoned with spices, herbs, and other natural flavors, such as Uncle Ben's® Long Grain & Wild Rice, Original Recipe, which has a unique blend of wild and long grain rice and 23 natural herbs and seasonings, *see id.* at 23–25. The following examples are illustrative:



See RJD Ex. A at 28, 45.

B. The Diverse Packaging of the 43 Varieties of Uncle Ben's® Rice.

With different ingredients and mixtures come different packaging and fill requirements.

First, the sizes of the containers vary. Uncle Ben's® Original Converted® Brand Rice is packaged in both 1- and 2-pound cardboard boxes and 5-, 10-, and 12-pound transparent plastic bags. See RJD Ex. A at 7, 91. Uncle Ben's® Whole Grain Brown Rice is available in both 1-pound cardboard boxes and 2- and 5-pound transparent plastic bags. See *id.* at 11, 91. Uncle Ben's® instant rice is available in 14-ounce and 28-ounce containers. See *id.* at 5. Uncle Ben's® Ready Rice® is sold in 8.5-ounce containers. See *id.* at 49, 53. Uncle Ben's® Boil-In-Bag Rice is sold in 15.8-ounce containers. See *id.* at 1. And Country Inn® Rice and Flavored Grains are packaged in 5-ounce containers and 6.0- to 6.2-ounce containers respectively. See *id.* at 17, 36; *see also* Compl. ¶25 (including a photo of Uncle Ben's® Long Grain & Wild Rice container); *see id.* ¶ 24 (“Defendant's Rice Products are sold in varying non-transparent containers that contain different net weights.”).

Second, the contents of the packaging vary. The container for Uncle Ben's® Boil-in-Bag brands includes pre-measured bags for quick, easy cooking with minimal cleanup. See RJD Ex. A at 1–3. The containers for Uncle Ben's® flavored-grain brands include rice, couscous, quinoa, and pre-measured seasoning packets. See *id.* at 15–27. The containers for Uncle Ben's® Country Inn® Rice include rice, orzo pasta, and pre-measured packets for sauces and seasonings. See *id.* at 28–

1 40. And containers for Uncle Ben's® Ready Rice® contain rice and ingredients such as pinto
 2 beans, peas, carrots, corn, red beans, black beans, tomatoes, peppers, cilantro, barley, lentils, and
 3 quinoa. *See id.* at 41–86.

4 *Third*, the types of containers vary. Uncle Ben's® Boil-in-Bag is packaged in plastic bags
 5 placed in a 14-ounce cardboard box. *See* RJD Ex. A at 1–3. Uncle Ben's® Original Converted®
 6 Brand Rice and Whole Grain Brown Rice are packaged in both cardboard boxes and transparent
 7 plastic bags. *See id.* at 6–7, 10–11, 91. Ready Rice® and Dry Specialty Rice, in contrast, are
 8 packaged in plastic pouches. *See id.* at 41–90.



17 *See* RJD Ex. A at 3, 63.

18 *Finally*, the functionality of the packaging varies. While all of Uncle Ben's® rice is
 19 packaged to protect and preserve its contents, the majority of packaging is designed to perform a
 20 specific function. For example, the packaging for Uncle Ben's® Ready Rice® serves as the
 21 cooking vessel for the rice and is placed directly in the microwave. *See* RJD Ex. A at 41–86. For
 22 Uncle Ben's® "Boil-in-Bag" products, the rice is enclosed in a bag within the cardboard box that
 23 can be placed directly in a boiling water. *See id.* at 1–3.

24 **C. Plaintiffs' Far-Ranging and Wholly-Conclusory Challenge to the Diverse
 25 Packaging of the 43 Varieties of Uncle Ben's® Rice.**

26 Plaintiff Eric Lankenau-Ray purchased a single container of Uncle Ben's® Long Grain &
 27 Wild Rice" from a California grocery store in 2016. *See* Compl. ¶ 12 n.5. His New York
 28 counterpart, Plaintiff Carmen Vargas, purchased in 2015 Uncle Ben's® "Original" and 'Whole

1 Grain' product from a local grocery store in Stony Point, New York." Compl. ¶ 13 n.6. Plaintiffs
 2 do not allege—nor could they—that Uncle Ben's® rice products contained (1) less product than
 3 expressly indicated on the front of each container; or (2) fewer servings per container than listed
 4 on each product's nutritional label. *See* Compl. ¶ 29 ("[T]he container labels state the amount of
 5 Rice Product contained therein[.]"); *see also* 21 U.S.C. § 343(e)(2) (requiring manufacturers to
 6 provide "an accurate statement of the quantity of the contents"); 21 C.F.R. § 101.9(b)(8)
 7 (requiring manufacturers to calculate servings per container); *see also McKinnis v. Kellogg USA*,
 8 No. CV07-2611ABC, 2007 WL 4766060, at *4 (C.D. Cal. Sept. 19, 2007) (Nutrition facts "have
 9 long been required on food products and are familiar to a reasonable consumer.").

10 Instead, Plaintiffs claim that when they purchased Uncle Ben's® rice products, they
 11 "expected to receive a full container of product." *Id.* ¶ 5. Rather than being full, Plaintiffs allege
 12 that the "non-transparent, paper/cardboard containers" had "empty space, or slack-fill." *Id.* ¶ 5. To
 13 prove their point, Plaintiffs stick a ruler into container of Uncle Ben's® Long Grain & Wild Rice
 14 and Uncle Ben's® Country Inn Rice® Pilaf and conclude that "approximately 50% of the interior
 15 of the container is comprised of empty space." *Id.* ¶¶ 25–26. They then summarily conclude that
 16 "[t]here is no functional reason for including up to 50% slack-fill in the Rice products." *Id.* ¶¶ 25–
 17 26, 30.

18 But Plaintiffs do not plead facts regarding how loose-filled rice settles during shipment,
 19 how the size of containers is determined, or how containers are filled and sealed. Plaintiffs fail to
 20 mention that these containers for Uncle Ben's® Long Grain & Wild Rice and Uncle Ben's®
 21 Country Inn Rice® Pilaf must accommodate not only loose-filled rice, but also pre-measured
 22 seasoning packets. *See* RJN Ex. A at 23–25 (Uncle Ben's® Long Grain & Wild Rice combines
 23 seasoning packet containing a unique blend of 23 herbs and seasonings with a mix of wild and
 24 natural long grain rice); *see id.* at 38–40 (Uncle Ben's® Country Inn Rice Pilaf combines long
 25 grain rice and orzo pasta with a seasoning packet that contains herbs and seasoning). Plaintiffs
 26 ignore governing regulations that expressly permit manufacturers to include empty space in their
 27 packaging, claiming only that none of those regulations apply. *See* Compl. ¶ 22 ("None of the
 28 above safe-harbor provisions applies to Defendant's Rice Products."). And Plaintiffs fail to

1 account for the diverse packaging of the 43 varieties of Uncle Ben's® rice, choosing instead to
 2 challenge all of Uncle Ben's® rice products. *See* Compl. ¶ 27; *see id.* ¶ 24 (“Each of the containers
 3 has significant slack-fill”). Despite these many deficiencies, Plaintiffs purport to bring a multi-
 4 count, nationwide putative class action on behalf of all purchasers of Uncle Ben's® 43 varieties of
 5 rice products sold in the past four years, as well as two subclasses made up of California and New
 6 York purchasers respectively. *Id.* ¶ 40. These far-ranging and wholly-conclusory claims are
 7 unfounded and cannot survive a motion to dismiss.

8 STANDARD OF REVIEW

9 To survive a motion to dismiss under Rule 12(b)(6), a complaint must plead “enough facts
 10 to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
 11 570 (2007). A claim is plausible if the well-pleaded factual allegations of the complaint permit the
 12 court to “draw the reasonable inference that the defendant is liable for the misconduct alleged.”
 13 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). The Court is “not
 14 bound to accept as true a legal conclusion couched as a factual allegation,” and “[t]hreadbare
 15 recitals of the elements of a cause of action, supported by mere conclusory statements, do not
 16 suffice.” *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). Moreover, where, as here, all
 17 of Plaintiffs’ claims sound in fraud, a party must satisfy Rule 9(b)’s heightened pleading standard,
 18 which requires the plaintiff to plead the circumstances constituting fraud with particularity.
 19 *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009). Such claims “must be specific
 20 enough to give defendants notice of the particular misconduct which is alleged to constitute the
 21 fraud charged so that they can defend against the charge and not just deny that they have done
 22 anything wrong.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam) (internal
 23 quotation marks omitted); *see also Das v. WMC Mortg. Corp.*, 831 F. Supp. 2d 1147, 1166 (N.D.
 24 Cal. 2011) (applying rule to claims for negligent misrepresentation).

25 ARGUMENT

26 I. Plaintiffs Fail To State a Claim (Counts I–V).

27 To understand the defects in Plaintiffs’ claims, it is necessary to understand the
 28 regulations governing slack-fill. In 1990, Congress sought to create uniform national standards

1 regarding food labeling when it amended the Food, Drug, and Cosmetics Act, 21 U.S.C. §§ 301 *et*
 2 *seq.*, by enacting the Nutrition Labeling and Education Act (“NLEA”). *See* 21 U.S.C. §§ 343,
 3 343-1 (“National uniform nutrition labeling”). Pursuant to the NLEA, Congress charged the
 4 United States Food and Drug Administration (“FDA”) with promulgating regulations regarding
 5 the permissibility of slack-fill. *See* 21 U.S.C. § 343(d). The NLEA also contains broad preemption
 6 provisions. *See* 21 U.S.C. § 343-1(a)(3); *see also* *Mills v. Giant of Md., LLC*, 441 F. Supp. 2d
 7 104, 106–09 (D.D.C. 2006) (noting the breadth of NLEA preemption provisions), *aff’d on other*
 8 *grounds*, 508 F.3d 11 (D.C. Cir. 2007). These provisions expressly preempt any “requirement”
 9 that is “not identical to” the labeling requirements created by the FDA, including those for filling
 10 containers. *See* 21 U.S.C. §§ 343(d), 343-1(a)(3).

11 The statute preempts not only state statutes and regulations, but also common-law duties
 12 and responsibilities. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005); *see also*
 13 *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324–325 (2008) (“[E]xcluding common-law duties from
 14 the scope of pre-emption would make little sense.”); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504,
 15 522 (1992) (“[C]ommon-law damages actions . . . are premised on the existence of a legal duty,
 16 and it is difficult to say that such actions do not impose ‘requirements or prohibitions.’” (citation
 17 omitted)). Therefore, to state a claim that is not preempted by the federal regulations, Plaintiffs
 18 must allege sufficient facts to show that Uncle Ben’s® rice products fail to comply with the
 19 FDA’s slack-fill regulations.

20 **A. Functional vs. Non-Functional Slack-Fill.**

21 The FDA defines slack-fill as “the difference between the actual capacity of a container
 22 and the volume of product contained therein.” *Misleading Containers; Nonfunctional Slack-Fill*,
 23 58 Fed. Reg. 2957, 2959 (Jan. 6, 1993). FDA regulations do not require, however, that a product’s
 24 container be filled to its brim. Rather, the FDA recognizes that slack-fill serves functional
 25 purposes “and, therefore, can be justified even though some consumers may perceive it to be
 26 misleading.” *Id.* at 2960. The FDA further recognizes that consumer products “may have large
 27 levels of slack-fill” that are justified. *Id.* at 2959 (functional slack-fill levels for cereal products
 28 ranged “from 8.6 to 43.1 percent of the container volume.”); *id.* at 2960 (functional slack-fill

1 levels for candy bars was “as much as 63.8 percent”); *see Misleading Containers; Nonfunctional*
 2 *Slack-Fill*, 58 Fed. Reg. 64,123, 64,135 (Dec. 6, 1993) (recognizing that products may have “a
 3 significant amount of [functional] slack-fill”); *id.* (There is “no specific numerical value” that
 4 determines whether slack-fill is misleading.).

5 Pursuant to FDA regulations, slack-fill is only “nonfunctional”—and therefore unlawful—
 6 when it exists for reasons other than:

- 7 (1) Protection of the contents of the package;
- 8 (2) The requirements of the machines used for enclosing the
 contents in such package;
- 9 (3) Unavoidable product settling during shipping and handling;
- 10 (4) The need for the package to perform a specific function . . .;
- 11 (5) The fact that the product consists of a food packaged in a
 reusable container where the container is part of the presentation of
 the food and has value . . .; or
- 12 (6) Inability to increase level of fill or to further reduce the size of
 the package

13 21 C.F.R. § 100.100(a)(1)–(6). The FDA has broadly construed regulations that deem slack-fill as
 14 functional. For example, “[p]rotection of the contents of the package,” 58 Fed. Reg. at 64,136,
 15 includes ensuring package strength and stackability, preventing tampering and theft, and
 16 accommodating “packaging to extend shelf-life.” 58 Fed. Reg. at 2961. “The requirements of the
 17 machines used for enclosing the contents in such package,” 58 Fed. Reg. at 64,136, broadly
 18 includes filling machines, sealing machines, and “all equipment involved when product and
 19 package come together,” *id.* at 64,132. The FDA also recognizes that:

20 [P]roduct settling is a normal, unavoidable process for many types of food (e.g.,
 21 cereal and potato chips). Thus, [permissible] slack-fill that results from product
 22 settling is a function of the physical properties of the product (e.g., the shape of the
 23 pieces of food), and of the way in which the product is filled into the container
 24 (e.g., loosely packed).

25 58 Fed. Reg. at 2961. The FDA has further determined “[t]he need for the package to perform a
 26 specific function,” includes to provide convenience, accommodate premeasured packets, and “to
 27 play a role in the preparation or consumption of a food.” 58 Fed. Reg. at 64,134, 64,136.

1

2 **B. Plaintiffs Do Not Adequately Plead Violations of Slack-Fill Regulations.**

3 1. Plaintiffs' Allegations Are Impermissibly Conclusory.

4 Although Plaintiffs cite to the FDA's slack-fill regulations, they do no more than tender
 5 "naked assertions devoid of further factual enhancement," *Iqbal*, 556 U.S. at 678 (alternation and
 6 internal quotation marks omitted), that the empty space in containers of Uncle Ben's® rice
 7 products has no functionality. *See* Compl. ¶¶ 30, 38; *see id.* ¶ 22 ("None of the above safe-harbor
 8 provisions applies to Defendant's Rice Products."). To make matters worse, Plaintiffs attribute—
 9 without any factual basis—the empty space in Uncle Ben's® rice products as really just a scheme
 10 "to mislead the consumers, including Plaintiffs and members of the Class." *Id.*

11 Such conclusory and inflammatory allegations are insufficient to subject a manufacturer to
 12 an expensive, extended nationwide putative class action. *See McGlinch v. Shell Chem. Co.*, 845
 13 F.2d 802, 810 (9th Cir. 1988) ("[C]onclusory allegations without more are insufficient to defeat a
 14 motion to dismiss for failure to state a claim."); *see also Hartman v. Gilead Scis., Inc.*, 536 F.3d
 15 1049, 1055 (9th Cir. 2008) (The court does not accept as true "allegations that are merely
 16 conclusory, unwarranted deductions of fact, or unreasonable inferences." (internal quotation
 17 marks omitted)); *Corcoran v. CVS Health Corp.*, No. 15-cv-3504YGR, --- F. Supp. 3d ----, 2016
 18 WL 948880, at *8 (N.D. Cal. Mar. 14, 2016) (mere possibilities are not enough).

19 Were it otherwise, all that would be necessary to hold a manufacturer hostage to a putative
 20 class action sounding in fraud would be (1) a product sold in a non-see-through container; (2) a
 21 ruler placed into a product that is not filled completely full (i.e., chips, rice, cereal, pasta, ice
 22 cream, crackers, etc.); and (3) a conclusory allegation that the empty space serves no useful
 23 function. That is the precise outcome the pleading rules are intended to prevent. *See, e.g., Kearns*,
 24 567 F.3d at 1125 (Rule 9(b) serves multiple purposes including "provid[ing] defendants with
 25 adequate notice to allow them to defend the charge and deter[ing] plaintiffs from the filing of
 26 complaints 'as a pretext for the discovery of unknown wrongs' . . . [and] 'prohibit[ing] plaintiff[s]
 27 from unilaterally imposing upon the court, the parties and society enormous social and economic
 28 costs.'" (fifth alternation in original) (citation omitted)).

1 The insufficiency of Plaintiffs' claims is made worse by Plaintiffs' attempt to extend their
 2 conclusory allegations to the diverse packaging and fill requirements for all 43 varieties of Uncle
 3 Ben's® rice. Yet Eric Lankenau-Ray purchased a single package of Uncle Ben's® Long Grain &
 4 Wild Rice, which is sold in 6-ounce cardboard container. *See* Compl. ¶ 12 n.5; *see also* RJD Ex.
 5 A at 23. Carmen Vargas, in turn, purchased Uncle Ben's® Original Converted® Brand Rice and
 6 Whole Grain Brown Rice without specifying if she purchased the rice in 1- or 2-pound boxes or
 7 in 5-, 10- or 12-pound bags. *See* Compl. ¶ 13 n.6; RJD Ex. A at 6–7, 10–11. That is insufficient.
 8 *See also Surzyn v. Diamond Foods, Inc.*, No. C14–0136SBA, 2014 WL 2212216, at *5 (N.D. Cal.
 9 May 28, 2014) (“Defendant is entitled to fair notice of the particular product Plaintiff
 10 purchased.”); *Thomas v. Costco Wholesale Corp.*, No. 5:12-CV-02908EJD, 2013 WL 1435292, at
 11 *6–7 (N.D. Cal. Apr. 9, 2013) (dismissing complaint under Rule 9(b) because it “fail[ed] to
 12 unambiguously specify the particular products” at issue). Plaintiffs then attempt to leverage these
 13 limited purchases of three Uncle Ben's® rice products to attack all 43 varieties of Uncle Ben's®
 14 rice. *See* Compl. ¶¶ 19, 24, 27.

15 The sizes, contents, types, and functionality of the containers, however, vary markedly.
 16 *See supra* at pp. 2–5. Unsurprisingly, the reasons and amount of slack-fill in Uncle Ben's® rice
 17 products, as well as the applicability of the slack-fill regulations, also varies. For example, slack-
 18 fill regulations do not even apply to transparent plastic bags containing of Uncle Ben's® rice. *See*
 19 21 C.F.R. § 100.100(a) (applying only to containers that do not allow consumers to fully view
 20 their contents). Plaintiffs cannot fairly lump all 43 varieties of Uncle Ben's® rice together and
 21 hope that is sufficient to burden Mars with the expense of defending against a far-reaching, multi-
 22 claim, nationwide putative class action.

23 **2. Plaintiffs' Conclusory Allegations Are Facialily Implausible.**

24 “To survive a motion to dismiss, a complaint must . . . state a claim to relief that is
 25 plausible on its face.” *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). “Determining
 26 whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires
 27 the . . . court to draw on its judicial experience and common sense.” *Id.* at 679. Here, Plaintiffs’
 28 claim that the only reason empty space exists in Uncle Ben's® rice products is “to mislead the

1 consumers, including Plaintiffs and members of the Class.” Compl. ¶¶ 22, 38, 72. That claim is
 2 facially implausible.

3 *First*, Plaintiffs do not—and cannot—dispute that each container of Uncle Ben’s® rice
 4 conspicuously and accurately discloses to consumers both the exact amount of product contained
 5 therein and the number of Servings Per Container. *See id.* ¶ 29 (“[T]he container labels state the
 6 amount of Rice Product contained therein[.]”); *see also* 21 U.S.C. § 343(e)(2) (requiring
 7 manufacturers to provide “an accurate statement of the quantity of the contents”); 21 C.F.R.
 8 § 101.9(b)(8) (requiring manufacturers to calculate servings per container); *see also Viggiano v.*
 9 *Hansen Nat. Corp.*, 944 F. Supp. 2d 877, 892 n.38 (C.D. Cal. 2013) (“In cases where a product’s
 10 front label is accurate and consistent with the statement of ingredients, courts routinely hold that
 11 no reasonable consumer could be misled by the label, because a review of the statement of
 12 ingredients makes the composition of the [product] clear.”); *Gitson v. Trader Joe’s Co.*, No. 13-
 13 cv-01333-WHO, 2013 WL 5513711, at *7 (N.D. Cal. Oct. 4, 2013) (holding that reasonable
 14 consumer would not be deceived into believing soy milk was dairy when label said it was not);
 15 *McKinnis v. Kellogg USA*, No. CV07-2611ABC, 2007 WL 4766060, at *4 (C.D. Cal. Sept. 19,
 16 2007) (Nutrition facts “have long been required on food products and are familiar to a reasonable
 17 consumer.”).

18 *Second*, Plaintiffs’ theory of fraud makes no sense. Even the FDA acknowledges that “if
 19 consumers object to the level of slack-fill in a given package, they can easily identify that product
 20 by brand name and refrain from purchasing that particular product in the future.” 58 Fed. Reg. at
 21 2963; *see id.* at 2964 (“The benefit to consumers from changes in the regulations addressing
 22 slack-fill should therefore be quite modest.”). Plaintiff cannot plausibly suggest Mars would
 23 intentionally and unnecessarily create customer dissatisfaction, damage brand reputation, and lose
 24 future sales by intentionally deceiving consumers as to the amount being sold. It is against Mars’s
 25 financial interests to alienate consumers. *See Iqbal*, 556 U.S. at 679 (“[O]nly a complaint that
 26 states a plausible claim for relief survives a motion to dismiss.”).

27
 28

1 **II. Plaintiffs Lack Standing To Sue for 40 Varieties of Uncle Ben's® Rice They Did Not**
 2 **Purchase (Counts I-V).**

3 As an initial matter, Plaintiffs fail to satisfy basic constitutional standing requirements
 4 because they have sustained no “injury in fact” as a result of products they did not purchase.
 5 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). “[A]
 6 plaintiff must demonstrate standing for each claim he seeks to press.” *DaimlerChrysler Corp. v.*
 7 *Cuno*, 547 U.S. 332, 352 (2006). Because Plaintiffs were not injured by products they did not
 8 purchase, the Court should dismiss Plaintiffs’ claims based on such products. *Carrea v. Dreyer's*
 9 *Grand Ice Cream, Inc.*, No. C 10-01044JSW, 2011 WL 159380, at *3 (N.D. Cal. Jan. 10, 2011)
 10 (unless plaintiffs actually purchase a product, they cannot prove they “suffered any injury or lost
 11 money or property with respect to those products”), *aff'd*, 475 F. App'x 113 (9th Cir. 2012).

12 If this Court follows the alternative approach, focusing on whether there is “sufficient
 13 similarity between the products purchased and not purchased,” *Anderson v. Jamba Juice Co.*, 888
 14 F. Supp. 2d 1000, 1005 (N.D. Cal. 2012), Plaintiffs still lack standing. Under the “substantial
 15 similarity” test, courts traditionally look at factors including: whether the products are “of the
 16 same kind,” “comprised of largely the same ingredients,” and “bear[] the same alleged
 17 mislabeling.” *Wilson v. Frito-Lay N. Am., Inc.*, 961 F. Supp. 2d 1134, 1141 (N.D. Cal. 2013).
 18 Plaintiffs can bring claims about products they did not purchase only if “the crux of Plaintiff[s]’
 19 case” is “common misrepresentations” across all the products. *Brown v. Hain Celestial Grp., Inc.*,
 20 913 F. Supp. 2d 881, 892 (N.D. Cal. 2012); *see also Hendricks v. StarKist Co.*, 30 F. Supp. 3d
 21 917, 934 (N.D. Cal. 2014).

22 This case differs from the typical mislabeling case where a plaintiff alleges a common
 23 affirmative statement (e.g., “All Natural”) across a number of different products, which courts
 24 have found sufficient to establish a “sufficient similarity.” *See, e.g., Anderson v. Jamba Juice*, 888
 25 F. Supp. 2d at 1006; *see also Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861, 871–72
 26 (N.D. Cal. 2012) (rejecting standing for different chocolate products and noting that “[u]nlike
 27 *Astiana* and *Jamba Juice*, this is not the type of case where similar products or similar
 28 misrepresentations injured [plaintiff] in the same way as the unnamed plaintiffs”).

1 Here, there is no affirmative statement; rather, “the crux of Plaintiff[s]’ case” is that the
 2 Uncle Ben’s® rice products contain nonfunctional slack-fill. While Plaintiffs allege that all of
 3 Uncle Ben’s® rice products contain some slack-fill, Compl. ¶ 27, the relevant question here is
 4 whether the slack-fill is functional. For each variety of Uncle Ben’s® rice product, Plaintiffs will
 5 need to show that the slack-fill cannot be explained by any of the many bases for finding
 6 functionality. *See* 21 C.F.R. § 100.100(a)(1)–(6). The answer to that question depends on factors
 7 that will differ across the various Uncle Ben’s® rice products, including whether inevitable
 8 settling exists, whether the space is necessary for the manufacturing process, the need of the
 9 packaging to perform a specific function, or protection of the contents. Analyzing those factors
 10 will, in turn, require an analysis of the different manufacturing processes, filling processes,
 11 packaging, and types of rice in each of the 43 different kinds of Uncle Ben’s® rice products.

12 The Complaint contains no allegations that the manufacturing, filling, packaging, and type
 13 of rice for all Uncle Ben’s® rice products are “substantially similar.” This absence is fatal to
 14 Plaintiffs’ standing to assert claims for unpurchased products, because without this information,
 15 the “Court cannot determine whether the [u]npurchased [p]roducts are substantially similar to the
 16 [p]urchased [p]roducts for Article III purposes.” *Leonhart v. Nature’s Path Foods, Inc.*, No. 13-
 17 cv-00492BLF, 2014 WL 6657809, at *3–4 (N.D. Cal. Nov. 21, 2014) (dismissing claims for
 18 unpurchased products where plaintiff did not provide “any details regarding the products’
 19 ingredients, labeling, or packaging”); *see also Wilson*, 961 F. Supp. 2d at 1141–42 (dismissing
 20 claims for unpurchased product where plaintiff took “no time to explain how each of the
 21 [unpurchased] [p]roducts are actionably mislabeled” and noting that “[t]he Court will not assume
 22 that each of these subtly different [p]roducts is like all the others”); *Ivie v. Kraft Foods Glob., Inc.*, 961 F. Supp. 2d 1033, 1047 (N.D. Cal. 2013) (finding allegations of “similar packaging”
 23 insufficient to meet the standing requirement”).

25 Nor can Plaintiffs make such allegations. As just one example, the Complaint appears to
 26 cover both “boil in a bag” products, as well as products in which the rice is placed directly in the
 27 box. *See supra* pp. 5–6; *see also* R.J.N. Ex. A. “Boil in a bag” products fall into the category of the
 28 “need for the package to perform a specific function,” *see* 21 C.F.R. § 100.100(a)(4), while

1 arguments for other products may differ. The amount of “product settling,” *see id.* at
 2 § 100.100(a)(3), may vary between the products because, as the FDA has found, “many factors
 3 influence the amount of settling in a product,” 58 Fed. Reg. 64,123, 64,127. Here, the amount of
 4 settling depends on the type and mixture of the rice and other ingredients. *See id.* (identifying
 5 “particle size and shape, product density, and product fragility” as factors affecting settling). The
 6 different size containers² and the existence of a seasoning pouch in some of the Uncle Ben’s® rice
 7 products, *see supra* p. 4; *see also* RJD Ex. A, are other variables that affect the manufacturing and
 8 filling process. *See* 21 C.F.R. § 100.100(a)(2). These are just some of the differences between the
 9 various Uncle Ben’s® products. Because mislabeling in the context of slack-fill is a question of
 10 functionality, the substantial differences between the products mean that there is no “common
 11 misrepresentation” across all Uncle Ben’s® rice products.

12 The Court should dismiss all of the claims asserted by Plaintiffs to the extent they are
 13 based on products they did not purchase.

14 **III. Plaintiffs Lack Standing To Request Injunctive Relief (Counts I–V).**

15 Article III standing to seek injunctive relief requires that there is a “real or immediate
 16 threat that the plaintiff will be wronged again.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 111
 17 (1983). Prior to the Ninth Circuit’s recent decision in *Luman v. Theismann*, No. 14-15385, --- F.
 18 App’x ----, 2016 WL 1393432 (9th Cir. Apr. 8, 2016), some courts in this Circuit allowed
 19 plaintiffs to seek injunctive relief without alleging an intent to purchase the product in the future.
 20 *See, e.g., Lilly v. Jamba Juice Co.*, No. 13-cv-02887-JST, 2015 WL 1248027 (N.D. Cal. March
 21 18, 2015).³ However, the Ninth Circuit addressed this issue in *Luman* and made clear that in a

22 ² The differences are not just between different types of rice products; one type of rice product
 23 can be sold in different size containers. For example, in the White Rice category, Original Rice
 24 comes in 1-pound and 2-pound boxes, and 5-pound, 10-pound, and 12-pound bags, and Instant
 Rice is available in 14-ounce and 28-ounce boxes. RJD Ex. A at 4–7.

25 ³ These courts, *inter alia*, carved out a public policy exception to the requirements of Article III
 26 standing for consumer protection claims. *See, e.g., Henderson v. Gruma Corp.*, No. CV 10-
 04173AHM, 2011 WL 1362188, at *7 (C.D. Cal. Apr. 11, 2011). Other courts recognized that
 27 such a carve out “does not square with Article III’s mandate.” *Delarosa v. Boiron, Inc.*, No.
 SACV 10-1569-JST, 2012 WL 8716658, at *5 (C.D. Cal. Dec. 28, 2012). After all, the
 28 irreducible requirements of Article III standing do not change merely because plaintiffs invoke
 state consumer protection statutes. *See, e.g., Raines v. Byrd*, 521 U.S. 811, 820 n. 3 (1997)
 (“Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue

1 consumer protection case such as this, a plaintiff must allege an intent to purchase the product in
 2 the future in order to meet this requirement of Article III standing:

3 To maintain standing, Plaintiffs must show a sufficient likelihood that they
 4 will be injured . . . again in a similar way and that the future injury can be
 5 redressed by injunctive relief. Because Plaintiffs do not allege that they
 intend to purchase [the product] in the future, they cannot demonstrate a
 likelihood of future injury.

6 *Luman*, 2016 WL 1393432, at *2 (citation omitted). *Luman* confirmed previous rulings by the
 7 Ninth Circuit and the Northern District that a future intent to purchase is a *sin qua non* for
 8 standing to seek injunctive relief. *See, e.g., Perez v. Nidek Co., Ltd.*, 711 F.3d 1109, 1114 (9th
 9 Cir. 2013) (no standing for injunctive relief because “Perez does not allege that he intends to have
 10 further hyperopic surgery”); *Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1015 (N.D. Cal. 2014)
 11 (“[T]o demonstrate standing in a consumer protection class action . . . the named plaintiff ‘must
 12 allege that he intends to purchase the produc[t] at issue in the future.’” (third alteration in original)
 13 (quoting *Rahman v. Mott’s LLP*, No. CV-3482 SI, 2014 WL 325241, at *10 (N.D. Cal. Jan. 29,
 14 2014))); *Bird v. First Alert, Inc.*, No. C 14-3585 PJH, 2014 WL 7248734, at *5 (N.D. Cal. Dec.
 15 19, 2014) (“A plaintiff who has no intention of purchasing a product in the future has no standing
 16 to seek prospective injunctive relief.”).

17 Plaintiffs have not pled that they intend to purchase Uncle Ben’s® products in the future.
 18 Indeed, Plaintiffs allege the exact opposite: Had Plaintiffs “known about the slack-fill at the time
 19 of the purchase, they would not have bought Defendant’s Products.” Compl. ¶ 5; *see also id.*
 20 ¶¶ 12, 13, 36. Plaintiffs now know about the slack-fill in the products and, per their own
 21 allegations, will not purchase them in the future. Without any intent to purchase Uncle Ben’s®
 22 products in the future, Plaintiffs cannot establish that there is a chance that they will be “wronged
 23 again” by the allegedly deceptive slack-fill in the products.

24 Plaintiffs also cannot manufacture standing by arguing that unnamed class members might
 25 purchase Uncle Ben’s® rice products in the future. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996)
 26 to a plaintiff who would not otherwise have standing.”). Moreover, plaintiffs who lack Article III
 27 standing to seek injunctive relief may seek such relief in state courts, which are not bound by
 28 Article III. There are also various state and federal regulatory agencies that can be solicited to
 take action on consumers’ behalf. To the extent that the public policy exception was ever
 constitutionally permissible, the Ninth Circuit’s holding in *Luman* forecloses standing where the
 plaintiff has not alleged an intent to purchase the product in the future.

1 (“That a suit may be a class action . . . adds nothing to the question of standing.” (internal
 2 quotation marks omitted)). “Unless the named plaintiffs are themselves entitled to seek injunctive
 3 relief, they may not represent a class seeking that relief.” *Hodgers-Durkin v. De La Vina*, 199
 4 F.3d 1037, 1045 (9th Cir. 1999) (en banc). “Any injury unnamed members of this proposed class
 5 may have suffered is simply irrelevant to the question whether the named plaintiffs are entitled to
 6 the injunctive relief they seek.” *Id.* Rather, the named plaintiffs themselves must satisfy the
 7 requirements of Article III standing in order to represent the class. *See Frenzel*, 76 F. Supp. 3d at
 8 1015 (“A plaintiff who is not himself entitled to seek injunctive relief may not represent a class
 9 that seeks such relief.”).

10 **IV. Plaintiffs Cannot Maintain a Claim for Negligent Misrepresentation (Count V).**

11 Plaintiffs’ claim for negligent misrepresentation must be dismissed. While it is unclear
 12 whether Plaintiffs assert this claim under California or New York law, under either state’s law
 13 Plaintiffs have failed to state a claim.

14 **A. Plaintiffs Fail To State a Negligent Misrepresentation Claim under California
 15 Law.**

16 “Under California law . . . ‘omissions—that is, nondisclosures—cannot give rise to
 17 liability for negligent misrepresentation.’” *Leonhart*, 2014 WL 6657809, at *8 (quoting *Mitsui*
 18 *O.S.K. Lines, Ltd. v. SeaMaster Logistics, Inc.*, 913 F. Supp. 2d 780, 789 (N.D. Cal. 2012), *aff’d
 19 in part, rev’d in part*, 618 F. App’x 304 (9th Cir. 2015)). Instead, “[n]egligent misrepresentation
 20 is a species of fraud or deceit specifically requiring a ‘positive assertion’ or ‘assertion’ of fact. An
 21 ‘implied’ assertion or representation is not enough.” *Wilson v. Century 21 Great W. Realty*, 18
 22 Cal. Rptr. 2d 779, 783 (Ct. App. 1993). Here, Plaintiffs have not identified any affirmative
 23 representation about the Uncle Ben’s® rice products that they claim is false. Plaintiffs allege only
 24 an omission or failure to disclose that the products contained slack-fill. *See* Compl. ¶ 96
 25 (“Defendant actively *concealed* material facts”; “Defendant made partial representations that are
 26 misleading because some other material fact *has not been disclosed*”; “Defendant’s *failure to*

27

28

1 *disclose . . . constitutes material misrepresentations and materially misleading omissions*”
 2 (emphases added).⁴

3 **B. Plaintiffs Fail To State a Negligent Misrepresentation Claim under New York
 4 Law.**

5 Plaintiffs’ negligent misrepresentation claim also fails under New York law. Negligent
 6 misrepresentation, like fraud, is subject to the heightened pleading requirements of Rule 9(b).
 7 *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 583–84 (2d Cir. 2005) (per curiam).
 8 A necessary element of a negligent misrepresentation claim in New York is “the existence of a
 9 special or privity-like relationship imposing a duty on the defendant to impart correct information
 10 to the plaintiff.” *Mandarin Trading Ltd. v. Wildenstein*, 944 N.E.2d 1104, 1109 (N.Y. 2011)
 11 (quoting *J.A.O. Acquisition Corp. v. Stavitsky*, 863 N.E.2d 585, 587 (N.Y. 2007)). The required
 12 bond must be “so close as to be the functional equivalent of contractual privity.” *Ossining Union
 13 Free Sch. Dist. v. Anderson LaRocca Anderson*, 39 N.E.2d 91, 91 (N.Y. 1989); *see also Credit
 14 All. Corp. v. Arthur Andersen & Co.*, 483 N.E.2d 110, 118 (N.Y. 1985). This privity requirement
 15 is necessary to “provide fair and manageable bounds to what otherwise could prove to be limitless
 16 liability.” *Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 605 N.E.2d
 17 318, 320 (N.Y. 1992).

18 Ordinary arms-length relationships between buyers and sellers are insufficient. *See*
 19 *Kimmell v. Schaefer*, 675 N.E.2d 450, 450–54 (N.Y. 1996); *High Tides, LLC v. DeMichele*, 931
 20 N.Y.S.2d 377, 382–83 (2d Dep’t 2011); *see also Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 63–
 21 64 (2d Cir. 1988) (special relationship requires “a closer degree of trust and reliance than that of
 22 the ordinary buyer and seller.” (internal quotation marks omitted)). “Rather, liability for negligent
 23 misrepresentation has been imposed only on those persons [such as lawyers and engineers] who
 24 possess unique or specialized expertise, or who are in a special position of confidence and trust
 25 with the injured party such that reliance on the negligent misrepresentation is justified.” *Kimmell*,
 26 675 N.E.2d at 454.

27
 28 ⁴ Indeed, Plaintiffs make no allegations that the affirmative representations about the net weight
 of the rice or the number of servings is false.

1 Here, Plaintiffs do not allege facts showing privity or a special relationship with Mars.
 2 Instead, Plaintiffs allege that they collectively purchased Uncle Ben's® rice products on three
 3 occasions. *See Compl. ¶¶ 12 n.5, 13 n.6.* Such allegations do not establish a special relationship.
 4 *See Am. Protein Corp.*, 844 F.2d at 63 (buyer-seller relationship is insufficient); *Dall. Aerospace,*
 5 *Inc. v. CIS Air Corp.*, 352 F.3d 775, 788 (2d Cir. 2003) (“[T]he law of negligent
 6 misrepresentation requires a closer degree of trust between the parties than that of the ordinary
 7 buyer and seller in order to find reliance on such statements justified.”); *Landesbank Baden-*
 8 *Wurttemberg v. Goldman, Sachs & Co.*, 478 F. App'x 679, 682 (2d Cir. 2012) (same); *Jurgensen*
 9 *v. Felix Storch, Inc.*, No. 12 Civ. 1201(KBF), 2012 WL 2354247, at *9 (S.D.N.Y. June 14, 2012)
 10 (dismissing negligent misrepresentation claim premised on relationship of purchaser and
 11 manufacturer of freezer appliance); 60A N.Y. Jur. *Fraud and Deceit* § 143 (West 2016) (“A
 12 special relationship does not exist where the only contact between the defendant and the plaintiff
 13 is that the latter, as an unidentified member of the public, read and relied on a deceptive
 14 advertisement of the former.”).

15 **V. Plaintiffs Cannot Apply Consumer Protection Laws Extraterritorially (Counts I–IV).**

16 Variations in state consumer protection laws routinely require denial of class certification.
 17 Here, Plaintiffs seek to avoid that result by applying California's consumer protection laws and
 18 New York's General Business Law Section 349 (“NY GBL”) to all Uncle Ben's® rice products
 19 purchased by consumers nationwide. *See Compl. ¶¶ 66, 78, 88.*⁵ That is improper.

20 **A. Plaintiffs Cannot Enforce California Laws Outside of California (Counts I, II,
 21 & III).**

22 Under California state law, there is a presumption against the extraterritorial application of
 23 California's consumer protection statutes. *See Figy v. Frito-Lay N. Am., Inc.*, 67 F. Supp. 3d
 24 1075, 1086–87 (N.D. Cal. 2014) (“[T]he ordinary presumption against extraterritorial application
 25 of California law applies to UCL, CLRA, and FAL claims”); *see also Norwest Mort., Inc. v.*
 26 *Sup. Ct.*, 85 Cal. Rptr. 2d 18, 23 (Ct. App. 1999) (“We ordinarily presume the Legislature did not

27

 28 ⁵ The Complaint alleges the CLRA count on behalf of both Plaintiffs. To the extent that Plaintiff Vargas seeks to assert a CLRA claim, it must be dismissed.

1 intend the statutes of this state to have force or operation beyond the boundaries of the state.”); *id.*
 2 at 23–24 (concluding that, with respect to the UCL, the legislature did not intend the law to apply
 3 to claims “of non-California residents injured by conduct occurring beyond California’s
 4 borders”). “Applying that presumption, state and federal courts have concluded that California’s
 5 consumer protection statutes do not reach claims of non-California residents arising from conduct
 6 occurring entirely outside of California.” *Gentges v. Trend Micro Inc.*, No. C11-5574SBA, 2012
 7 WL 2792442, at *6 (N.D. Cal. July 9, 2012).

8 **B. Plaintiffs Cannot Enforce New York Law Outside New York (Count IV).**

9 Plaintiffs seek to assert a claim under New York’s General Business Law Section 349 as
 10 to all Uncle Ben’s® purchases made by consumers nationwide. *See* Compl. ¶¶ 87–93. But by its
 11 own terms NY GBL Section 349 does not apply to out-of-state transactions. Rather, it prohibits
 12 only “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the
 13 furnishing of any service *in this state.*” NY GBL § 349(a) (emphasis added). To be actionable
 14 “the transaction in which the consumer is deceived must occur in New York.” *Goshen v. Mut. Life*
 15 *Ins. Co. of N.Y.*, 774 N.E.2d 1190, 1195 (N.Y. 2002).

16 Because NY GBL Section 349 does not apply to out-of-state purchases, Plaintiffs’ attempt
 17 to apply that statute extraterritorially must fail. *See Moseley v. Vitalize Labs, LLC*, Nos. 13 CV
 18 2470 (RJD)(RLM), 14 CV 4474 (RJD)(RLM), 2015 WL 5022635, at *8 (E.D.N.Y. Aug. 24,
 19 2015) (dismissing claims under the consumer-protection laws of states where plaintiff did not
 20 reside); *Szymczak v. Nissan N. Am., Inc.*, No. 10CV7493 (VB), 2011 WL 7095432, at *12
 21 (S.D.N.Y. Dec. 16, 2011) (dismissing New York claims as to plaintiffs who did not purchase
 22 automobiles in New York); *Williamson v. McAfee, Inc.*, No. 5:14-CV-00158-EJD, 2014 WL
 23 4220824, at *7 (N.D. Cal. Aug. 22, 2014) (dismissing New York claims for plaintiff who “failed
 24 to allege any actionable deception he suffered in New York”). Accordingly, Count IV should be
 25 dismissed as to Plaintiff Lankenau-Ray and all putative class members who did not purchase an
 26 Uncle Ben’s® product in New York.

27
 28

